FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

SENSITIVE

MEMORANDUM

TO: The Commissioners
Acting Staff Director
General Counsel's Noble

FROM: Marjorie W. Emmons/Lisa R. Davis
Secretary of the Commission

DATE: January 20, 1999

SUBJECT: Corrected Copy of the Statement of Reasons for MUR 4687.

Attached is a corrected copy of the Statement of Reasons for MUR 4687 signed by Commissioners Lee Ann Elliott and David M. Mason. This was received in the Commission Secretary's Office on Wednesday, January 20, 1999 at 10:16 a.m.

Attachment

c: V. Convery, OGC

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Voinovich for Senate Committee and Vincent M. Panichi, as treasurer	)	**CORRECTED COPY**
	)	**MUR 4687**
Keep Ohio Working and Roger R. Geiger, as treasurer	)	
	)	
Wilson Grand Communications, Inc.	)	

STATEMENT OF REASONS OF COMMISSIONERS LEE ANN ELLIOTT AND DAVID M. MASON

On December 9, 1998, the Commission, by a vote of 6-0, adopted the recommendation of its Office of General Counsel (OGC) to find no reason to believe that Respondents Voinovich for Senate Committee and Vincent M. Panichi, as treasurer; Keep Ohio Working (KOW) and Roger R. Geiger, as treasurer; or Wilson Grand Communications, violated the Federal Election Campaign Act (FECA). The Democratic Senatorial Campaign Committee had complained that the Respondents violated the FECA as a result of two advertisements that KOW ran in support of a state ballot initiative. Respondent Voinovich—the sitting Governor of Ohio and a candidate for the United States Senate—appeared in these ads and urged Ohioans to vote for the ballot initiative.

We agree with the Commission's disposition of this matter. Governor Voinovich's appearance in the ballot measure advertisements was not for the purpose of influencing his Senate election; KOW did not coordinate its activities with the Voinovich for Senate Committee; and thus the advertisements did not constitute in-kind contributions to the Voinovich campaign. We disagree, however, with certain aspects of the OGC's analysis. We write to note and explain our disagreement with two of the more important components of the OGC's factual and legal analysis: the use of the "otherwise campaign-related" and "campaign themes" standards, and its citation to and reliance upon MUR 4305 (Forbes).

I.
MUR 4305 (Forbes)

We disagree with the Commission's prosecution of Malcolm S. "Steve" Forbes Jr., Forbes Inc., *Forbes* Magazine, Forbes for President, Inc., and Joseph A. Cannon, as treasurer of Forbes for President, Inc. (MUR 4305), in *Federal Election Commission v. Malcolm S. Forbes, Jr.*, et al., No. 98-6148 (BSJ) (S.D.N.Y.). In that action, the Commission alleges that Mr. Forbes *et al.* violated the prohibition on corporate contributions in 2 U.S.C. § 441b because Mr. Forbes continued to write his "Fact and Comment" columns in *Forbes* Magazine while he was seeking the 1996 Republican Presidential nomination. In these commentaries, Mr. Forbes discussed issues of public concern without advocating (expressly or otherwise) any candidate's election (including that of Mr. Forbes), or even mentioning any candidates or the fact of an election.

Nevertheless, the Commission alleges that Mr. Forbes violated § 441b because some of the issues he discussed in these columns were alleged themes of his campaign. As a result, the theory continues, the cost of these columns was "in connection with" Mr. Forbes campaign (and because Mr. Forbes wrote them, they were self-coordinated). Because we object to the Commission's Forbes litigation and the theories upon which it is based, we do not think the agency should rely upon it as precedent even in dismissing the Voinovich MUR.

II.
"Campaign Themes" and "Otherwise Campaign-Related" Tests

Although certainly in agreement with the Commission's disposition of this matter, we are, quite frankly, a bit surprised that the OGC could recommend dismissal. The First General Counsel's Report refers to no fewer than a half dozen tests, any of which, if satisfied, would bring the advertisements within the scope of the FECA: 1) express advocacy (*see*, First General Counsel's Report at 7-8); 2) electioneering message (*id.* at 7); 3) solicitation of contributions (*id.* at 7-8); 3) actual purpose (*id.*); 4) inferred purpose (*id.* at 7, 11); 5) otherwise campaign-related (*id.* at 8, 10); and 6) campaign themes (*id.* at 11-12). The sheer number of these snares, coupled with their wide reach (excepting, of course, numbers one and three), make it rather remarkable that at least one of them did not ensnarl the Governor.

The meaning of and distinctions between some of these tests puzzle us. For example, because a "purpose" necessarily involves an element of intent,[1] how, if at all, do an "actual purpose" and an "inferred purpose" differ? And in drawing inferences, how do we avoid the very vagueness concerns which have moved the courts to rein in our

[1] A "purpose" is "[a] result or an effect that is *intended* or desired; an *intention*." *The American Heritage College Dictionary* (3rd ed.) at 1111 (emphasis added).

regulatory reach?[2] Further, what is the difference between a communication that is "*otherwise*-related to a campaign" and one that contains a "campaign theme," given that in both cases, neither communication contains either express advocacy or an electioneering message? Difficulties such as these in understanding precisely the Commission's own tests cause us to empathize considerably with the regulated community.

Of particular concern to us are our two tests of most recent vintage: "otherwise campaign-related" and "campaign themes." We have serious First Amendment vagueness and overbreadth concerns about them.[3] It is not clear to us how we will decide what issues a candidate discusses are also "themes" of his campaign (or, worse yet, are "otherwise-related" to it), or when these "themes" have become sufficiently crystallized (or "otherwise related" to the campaign) so as to trigger the FECA, both factors evidently being of some importance to our OGC. *See* First General Counsel's Report at 12 ("Given the timing of the Issue 2 campaign, a year before the 1998 general election, it is not clear that Gov. Voinovich's 'theme' or 'themes' had developed at that point or that the condition of Ohio's worker's compensation system . . . is an issue in the 1998 United States Senate race in Ohio."). Indeed, it seems that anything a candidate discusses that is of significant concern to the citizenry could be deemed a "theme" of the campaign (or "otherwise related" to it).

We also believe that as rules of conduct, the "otherwise campaign-related" and "campaign themes" tests violate the FECA and may violate the Fifth Amendment. Neither of these tests was promulgated pursuant to the procedures established by 2 U.S.C. § 438(d), as the FECA requires. *See* 2 U.S.C. § 437f(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title."). This lack of notice to the regulated community and opportunity for it to be heard--coupled with the difficulty in understanding both the meaning of these tests, *supra*, and their differences, *ante* at 2--may offend the due process clause. If, on the other hand, these phrases are nothing more than proxies for the FECA's "for the purpose of influencing" and "in connection with" language, the Commission should state explicitly that it is attempting to apply the statute without regulatory or judicial explication.

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[2] In *Buckley v. Valeo*, for example, the Supreme Court eliminated the "relative to" test in the original (1974) FECA because of just the sort of vagueness problems that these subjective "purpose" tests embody: such tests "put[] the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever *inference* may be drawn as to his *intent* and meaning." 424 U.S. 1, 43 (1976) (emphasis added). To eliminate these problems, the Court crafted the objective express advocacy test. *Id.* at 43-44.

[3] The "otherwise campaign-*related*" test, in particular, seems dangerously close to the "*relative* to" test that the Supreme Court invalidated in *Buckley*. *See* note 2, *supra*.

This is not to say that we would never apply a test other than "express advocacy." But such a test would have to respect sufficiently the First Amendment and be promulgated in accord with the requirements of the Fifth Amendment and the FECA. Both the "otherwise campaign-related" and "campaign themes" standards fail miserably in these respects. Fortunately, the Respondents here were not harmed as a result. And we would object to any efforts to apply these vague and overbroad tests against future respondents based upon references to them in dismissing this Complaint.

Lee Ann Elliott
Commissioner

David M. Mason
Commissioner

January 20, 1999